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IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1989

JOHN EDWARD SWINDLER,  
PETITIONER

VS.

A. L. LOCKHART, DIRECTOR OF  
ARKANSAS DEPARTMENT OF  
CORRECTIONS,

RESPONDENT

No. \_\_\_\_\_

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
APPEALS FOR THE EIGHTH CIRCUIT

APPENDIX VI  
Testimony of Don Langston  
Habeas Corpus Hearing

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THE COURT: All right. Come forward, Judge.

DON LANGSTON, PETITIONER'S WITNESS, SWORN.

DIRECT EXAMINATION

BY MR. RAGAN:

Q State your name, please, sir.

A Don Langston.

Q And what's your age?

A Forty-nine.

Q And where do you live?

A Fort Smith.

Q And how long have you lived in the Fort Smith area?

A Fifteen years.

Q And what is your profession at the present time?

A I'm the Circuit-Chancery Judge in Sebastian and Crawford Counties, the 12th Judicial District.

Q All right. Back in 1978 what was your profession??

A I was Sebastian County Public Defender.

Q And how long had you been Public Defender in Sebastian County?

A Since December of 1971.

Q And what date were you admitted to the Bar of Arkansas?

A 1961.

Q After your admission to the Bar in the State of Arkansas, what type of practice did you engage in?

A I was a trial attorney for the Arkansas State Highway

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Commission for five years.

Q And then that was from 1961 to 1965, '66?

A It was November of '61 until -- I was in six months military duty in '61; then I left the military, came to the Highway Commission in December of -- November of 1961 and stayed with them until January the 1st of 1967.

Q And between 1967 and 1971, what type of work were you in?

A From January of '67 through March of 1970 I was a Deputy Attorney General in charge of their Litigation Division here in Little Rock. Then I became a Deputy Prosecuting Attorney for the remainder of 1970 for Pulaski County in 1970. Then I was a Deputy Prosecuting Attorney in Sebastian County for 11 months in 1971, and then became Public Defender.

Q And you were Public Defender and handled the first trial of John Swindler's case and the second trial; is that correct?

A Yes, sir.

Q You were the only attorney in the first case; is that correct, sir?

A No, I was Assistant -- or we didn't actually say who was the lead attorney, but myself and my deputy at that time, Hubert Graves, represented Mr. Swindler.

Q And in the second case it was you and Mr. John Sexton; is that --

A Settle, yes.

Q Settle. All right. Prior to 1977, you had handled a

great number of criminal cases, jury trials; is that correct?

A I'd say 10, 12, 14 a year, something like that.

Q So you would have had in the six years or so that you had been the Public Defender 50 or 60 jury trials to your credit by that time?

A I suppose so. I didn't keep up with them but it was nine, ten, eleven, something like that, maybe even up to 14, 15.

Q Judge, in preparing a case, a capital murder case for trial, would you not agree that a defense counsel has three intertwined and interrelated functions: He has -- one, one of his goals he would try to achieve would be to acquit his client, and then if he was not able to acquit him to save his life and then to prepare a record or keep a good record for appeal; would you not agree with that, sir?

A I guess as a summarization, that's pretty good.

Q And as the attorney for John Swindler in his first trial, you were also the attorney for the -- on the appeal; is that correct?

A Yes, sir.

Q And in that case, there was a reversal by the Supreme Court of Arkansas; is that not correct?

A Yes, sir.

Q And basically, the Supreme Court reversed on two bases. There was a great deal of pretrial publicity in Sebastian

County, and the Trial Court had seated jurors who should not have been seated because of prejudices?

A Actually my own memory of that is not that good. I did read the material, but that's basically what a brief or a petition or something that I have read said, so I'd just have to rely on that. I don't think they reversed it on any other grounds except jury matters.

Q And the Supreme Court of Arkansas remanded the case, and the case was changed with instructions that it be moved from Sebastian County; is that correct?

A Yes, sir.

Q Do you recall when you first learned of the date that the case was being transferred from Sebastian County to Scott County?

A I would say it would probably have been a month or two after the mandate came from the Supreme Court. I really don't have any independent recollection of the date.

Q In your practice in Fort Smith -- where were you born, Judge Langston?

A Coal Hill, Arkansas, in Johnson County.

Q So you're from that area of Arkansas; are you not?

A Yes, sir.

Q Western part of Arkansas. And I take it that in your practice you have had occasion to be in the Scott County Circuit Court?

A I think the only time I'd ever been in the Scott County Circuit Court was when I represented the Highway Department.

Q But you were not unfamiliar with Waldron and the nature of the community in Scott County?

A Well, it had been in the early Sixties since I had been there.

Q Scott County is a very rural county, is it not?

A Yes.

Q Population, I think you stated in your brief to the Supreme Court about 8300 people. Waldron is a small town of about 2500 people; is that correct?

A I don't recall but it's not a very big place.

Q And it is the county due south of Sebastian County, and Waldron is about 45 miles south of Fort Smith; is it not?

A That sounds correct.

Q There are no daily newspapers published in Waldron, are there?

A Not that I know of.

Q And there are no television stations in Waldron, are there?

A Not that I'm aware of.

Q The media in Waldron and Scott County comes out of primarily Fort Smith, does it not?

A That's the way I recall it.

Q Prior to the second trial, did you do any preparation or

investigation as to the prejudice of persons in Scott County against the Petitioner John Swindler?

A I'm not aware of any.

Q At the second trial, I believe there were about 250 veniremen in the jury wheel, and of those 250, some 40 or some-odd were excused for reasons other than knowledge of the case, I believe. So that there were about 190 veniremen left in the panel at the time that you started the questioning of the jurors; is that correct?

A I'm not sure but that sounds basically correct. I know that there were some that were excused because they were over 65; some were excused because they presented certificates from their doctor that they were not able to serve. There may have been a few other reasons but I can't recall what they were.

Q And the examination of the jurors took a total of about five days, did it not?

A That's my recollection.

Q Okay. And during that examination there was a total of about 79, I believe, jurors who were excused for cause because of the defense -- because they had prejudice against the defendant from information they had received in the media; is that correct?

A You'd have to consult the trial record on that, but that -- I wouldn't dispute that number.

Q There were a great number of persons, of veniremen



1 who had been -- were excused because of cause; is that  
2 correct?

3 A Yes, sir.

4 Q The defense did not use its last preemptory challenge  
5 until after the 11th jurymen or juror had been seated, did  
6 they?

7 A Who didn't?

8 Q The defense, John Swindler.

9 A I don't recall. We were closely guarding those  
10 preemptory challenges because that's just the way defense  
11 does. It could have been at that particular point. I don't  
12 recall.

13 Q In preparation of the first appeal, Judge Langston, you  
14 became familiar with the Supreme Court case Irwin V. Dow, did  
15 you not?

16 A Yes, sir.

17 Q And the Indiana statute on change of venue on that case  
18 is very similar to the Arkansas Statute, wouldn't you say?

19 A I don't recall.

20 Q One, the Indiana statute allowed one change of venue and  
21 to a contiguous county which is similar to the Arkansas  
22 statute.

23 A I think the only thing I recall from that decision was is  
24 that Irwin versus Dow said that there could be a second change  
25 of venue is the best I recall.

1 Q Now you did not file a motion for a change of venue from  
2 Scott County, did you?

3 A No, sir.

4 Q And you did not prepare any affidavits for change of  
5 venue, did you?

6 A No, sir.

7 Q Would you tell the Court why you did not file a motion  
8 for a change of venue?

9 A Didn't think it was necessary.

10 Q Do you still hold to the opinion that you don't think it  
11 was necessary?

12 A Yes, sir.

13 Q Even though over almost half of the jurors were -- or a  
14 third of the jurors on the panel were excused because of  
15 cause?

16 A I thought that if venue was going to be changed, that  
17 would be the reason to change it.

18 Q Okay. But you took no independent investigation as to  
19 the feelings in the community prior to the trial?

20 A I knew what they were.

21 Q What were those opinions?

22 A About the same as it was in Sebastian County.

23 Q And yet those opinions that prevailed in Sebastian County  
24 were -- and there was a record in the first trial upon which  
25 the Supreme Court reversed the conviction in the first trial;

1 is that not correct?

2 A I'm sorry. I -- I didn't follow your question.

3 Q In the first trial, there was a record -- there had been  
4 a motion for a change of venue; is that correct?

5 A Yes, sir.

6 Q And based upon that record that was in the first trial,  
7 the Supreme Court of Arkansas reversed the conviction; is that  
8 not correct?

9 A Yes, sir.

10 Q But in the second trial with the same type of community  
11 feeling against the defendant, there was no record, was there?

12 A I thought the record was made when we voir dired the  
13 jury.

14 Q But there had not been a motion filed?

15 A That's correct.

16 Q Were you acquainted with any other attorneys in Waldron  
17 at the time of the second trial?

18 A I'm not sure whether there were any there or not. There  
19 may have been but I'm not -- I don't remember.

20 Q Did you talk with any of the courthouse personnel, the  
21 clerk, the sheriff, concerning what the feeling in the  
22 community was against John Swindler?

23 A Yes, sir.

24 Q What would these officials -- who did you talk to, first  
25 of all?

1 A I think I talked to the Clerk and the Sheriff, or there  
2 may have been some other county officials. I can't recall  
3 right now.

4 Q Do you recall what their comments were with reference to  
5 the feeling against John Swindler in Scott County?

6 A About the same as it was in Sebastian County.

7 Q And what was that opinion in Sebastian County, Judge?

8 A Well, it was strongly unfavorable to Mr. Swindler.

9 Q During the trial of the case, Judge, or during the voir  
10 dire proceedings, was there ever an admonition made to the  
11 veniremen not to discuss the case or read about it?

12 A I don't know.

13 Q Did you ever request such an admonition by the trial  
14 court?

15 A I don't recall.

16 Q After the first case, the trial of the first case, you  
17 pretty much knew what to expect upon the second trial of the  
18 case; is that correct?

19 A I think it was pretty well a re-run of the first one.

20 Q All right. In the first case, did you put on any  
21 mitigating circumstances for -- to mitigate against the  
22 aggravating circumstances that the State put on, when you  
23 questioned in the penalty portion of the trial?

24 A I don't recall.

25 Q I take it in the investigation of the case, you had many

conferences with John Swindler?

A I think about all the conferences we had with him was, was just to prepare him for his own testimony.

Q All right. Did you ever discuss with him his previous incarceration in various institutions?

A Well, it seems to me like about all we talked about probably was Leavenworth. I'm not sure whether we ever talked about any State penitentiary or not.

Q Do you recall whether or not you ever discussed with him any psychological examinations of him?

A I don't recall that.

Q Now is it not true that prior to the first case, he was examined by the officials at the State Hospital here in Little Rock?

A Yes.

Q And those officials found him -- or the report from those officials indicated that he was competent to stand trial?

A Yes, sir.

Q Did you ever had any discussions with them concerning any mental problems that he might have which might be offered in mitigation?

A I think what I did was I got the complete file from the State hospital. I believe I did, and -- but I'm not sure whether -- I may have conversed with some down here or I may not have. I don't recall, but I think I did get the nurses

notes and all that from the State Hospital and all the reports before they staff them and all of those things, but if I didn't it would surprise me, but I think I did.

Q Do you recall ever have conversations with the psychiatrist or psychologist who examined John Swindler?

A I don't have any independent recollection of it now.

Q In any event, none of those officials or persons were called in support of any mitigating circumstances, were they, in either the first of the second trial?

A I think that my basis on that was that I read over the reports. And I felt that what was in those reports was more damaging than was helpful. That's my recall now.

Q Do you recall -- now in John Swindler's testimony in the second trial, he has -- a portion of his testimony went to his mental problems that he had had in his youth up to the time that he had been arrested, falling off the bridge, being knocked unconscious for two or three days, those type of things, and he testified to those in the main portion of the trial; is that correct?

A I guess he did, if you're telling me he did. I really -- seems to me like all I have read of this transcript is, is the penalty phase of it, and I do allude to that, to some of that in my closing argument, so I assume that he did testify to some of his background information.

Q Now you had talked with John concerning these instances



1 in his past; is that correct?

2 A I don't know how else I could have found out about them  
3 if I hadn't have really.

4 Q Did you take any other steps to investigate these things  
5 that he had informed you about, about his past?

6 A We got some information from South Carolina, but I'm not  
7 sure whether it was concerning any of his mental status or  
8 not.

9 Q Did you ever request from any of the Federal or State  
10 institutions in which he had been in in the past any  
11 psychological or medical records?

12 A Not that I'm aware of.

13 Q Did you talk with any of his -- the members of his family  
14 concerning his health or his mental problems that he may have  
15 had in the past?

16 A I don't think so.

17 Q And the only evidence in mitigation was John's own  
18 testimony concerning his injuries; is that correct, that he  
19 had had in the past?

20 A The only thing I think we alluded to during -- I'm going  
21 by what we argued in closing argument, I guess, was what was  
22 brought out during the testimony during the case in chief --

23 Q Yes, sir.

24 A -- and that would have been his testimony and any other  
25 testimony we could have had that would have been during the

1 particular points in the trial.

2 Q Judge, did he not use in that testimony the term  
3 "paranoia," that officials had found him to be paranoid?

4 A All I can go by is, is I think I referred to that in my  
5 closing argument, so I assume that he did.

6 Q But you took -- other than that statement from John  
7 Swindler, you took no other steps to investigate the nature  
8 and extent of this paranoia?

9 A I read the State Hospital reports. They didn't find  
10 anything like that.

11 Q The State Hospital Report was primarily -- the direction  
12 of the State Hospital Report was to find whether or not John  
13 Swindler was competent to stand trial or competent at the time  
14 he committed the offense; is that correct?

15 A Yes, sir. I think they're supposed to advise if there's  
16 any other problem such as a personality disorder or anything  
17 like that.

18 Q And do you recall talking with any of the physicians who  
19 examined him or the psychologist whether or not there were any  
20 type of personality disorders?

21 A I would just have to refer you to the report they filed  
22 with the Court and also the reports that they sent us under  
23 subpoena.

24 Q You did have -- you did subpoena the records then?

25 A That's the only way you can get them out of the State



Hospital.

Q But you do not have any independent recollection what those reports contain?

A I hope I don't have this case mixed up with another one, but I thought that everything in it was more damaging than it was helpful the best I recall. I thought that the State could beat us to death with these and we would be worse off using it as we were trying to use it.

Q In the second case when it was appealed to the Supreme Court, you also handled that appeal to the Supreme Court; is that correct?

A Yes, sir.

Q The Supreme Court indicated that you argued the same issue of pretrial publicity and prejudice in the community that had been argued in the first case, but the Supreme Court said that there was no evidence in the record to support that argument; is that not correct?

A I don't recall it.

Q Judge, I'd hand you a copy of the Southwestern Reporter of this case and marked there -- does that not indicate that the record in that case did not contain --

A Oh, they're -- they're talking about no -- none other than the voir dire of the jury. I assume that's what they're talking about. I thought that there was plenty of evidence in the record myself, but that's their opinion.

Q Did the trial between the mandate coming from the second or the first case of the Supreme Court, the time between the trials and the mandate coming down from the Supreme Court was sufficiently long that you could have if you had wanted to, to examine the prejudices in Waldron and Scott County?

A I had plenty of time.

Q And you knew the procedure on filing for a change of venue, did you not?

A I didn't think it was necessary. Still don't.

Q But you did argue in your brief to the Supreme Court in the second case that there was pretrial publicity to such an extent in Scott County that it was impossible to get a jury who would not be biased against the defendant?

A I based that on the voir dire of the jury.

Q Prior to the trial of the case, you had also had information which -- from the officials in the County that the same type of prejudice that existed in Sebastian County also existed in Sebastian County? (Sic)

A I'm not sure that I had it that soon. I think I probably only learned of that while we were going down there is the best I recall. I don't think you have to have any solid evidence. I think you can just go by what the talk is.

Q And you did not take any steps to find out what the talk was prior to you drove down to Waldron for the trial?

A I knew what the talk was.

Q And the basis of that knowledge is what, sir?

A Just talk.

Q Now that was -- you were living and practicing law in Sebastian County at that time; is that correct?

A Yes, sir.

Q I'm talking about in Scott County.

A I see people from Scott County from time to time.

Q So you were familiar with Scott County and the people who live there and had a pretty good feel of what their opinion would be, I take it then?

A I don't know whether it's that solid, sir. It's -- these things are developing. It just -- it just comes to you. I don't think it would take anybody with more than average intelligence to know what was going on.

Q Now you argued that in your brief to the Supreme Court that Scott County was -- the media in Scott County comes primarily from Fort Smith; is that correct?

A Yes, I think they do have cable out of Little Rock, but I'm not sure. I think they do.

Q But primarily they --

A I think the daily newspaper is basically from Fort Smith. There's three television stations in Fort Smith. I believe the radio, most of the radio carries down to there. They may have their own local radio station but I'm not sure.

Q The Judge said, I believe, that there had been a great

1 down there. I could have just drove down there and talked to  
2 anybody I wanted to talk to if I had've felt it was necessary.

3 Q Okay. My only other question at this point would be do  
4 you have anything else you would like to add to any of the  
5 questions that have been posed here to you? Do you have any  
6 other thoughts that occurred to you at this point that you'd  
7 like to inform the Court of?

8 A No, sir.

9 MR. GILLMAN: Your Honor, for purposes of cross  
10 examination, I think that's all I have of this witness.

11 MR. RAGAR: Just a small amount of redirect, Your  
12 Honor.

13 THE COURT: All right.

14 REDIRECT EXAMINATION

15 BY MR. RAGAR:

16 Q On direct examination, you indicated that you knew what  
17 the evidence was going to be in the second trial pretty much  
18 only as a rehash of the first trial. I take it that you had a  
19 -- as a trial lawyer who was experienced -- a pretty good gut  
20 feeling about what the outcome would be on the second trial as  
21 far as the guilt or innocence was concerned?

22 A Well, we hoped to get the charge reduced at least to, you  
23 know, first degree murder, or hoped to maybe get it down to  
24 second degree, but we felt that we might have a chance on like  
25 first degree or something like that because it all happened on

an incident out there at the service station, and that was basically our theory was to try to use some sort of a justification that it was a gun battle type of situation and not a premeditated type of situation so that we could get it down to some lesser degree but we were not successful at either trial.

It was probably a remote hope on our part, but I think a lot of defense attorneys have -- all they have on lots of cases is just remote hope.

Q Judge, when you went to trial the second time you had a pretty good idea, though, that the same -- as far as the penalty would be, the State had not indicated that they were going to go for a lesser charge or anything like that. They were still going for capital murder --

A Oh, yes.

Q -- and seeking the death penalty?

A Oh, yes.

Q That there was a high likelihood that the death penalty would be imposed also?

A Well, whenever you try a capital case, the death penalty is always what you're staring at, so I don't have any reason to dispute what you said.

Q And between the second and -- first and second trial, you did not take any steps to develop any mitigating evidence, did you?

A Just the Don Reed testimony was all that I tried to develop.

Q Mr. Reed's testimony was -- went to the nature of death by electrocution, did it not?

A I'll tell you, I was going to try to develop it further than what it had been developed in Georgia, but I just can't recall exactly what all we were going to go into. We talked four or five times, I guess, about what his testimony would be, and I told him that I definitely wanted to develop it further than what I had in that little transcript I had, but to tell you right now what we were going to talk about other than the death penalty I can't recall. I was going to more or less go into more detail about how gruesome it was, I think.

Q Mr. Reed's proffered testimony would not have gone to John Swindler as a defendant, though, would it?

A I don't recall whether it would or --

Q It was not unique to his situation. It would apply to any person facing the death penalty, I take it?

A I would assume that's correct.

Q Now you indicated on your direct examination that you were of the opinion that as far as the pretrial publicity that you would be able to show that in Scott County there was prejudice similar to the prejudice that had been exhibited in Sebastian County at the first trial, and that through the voir dire you would be able to show that the Arkansas statute on



1 change of venue was unconstitutional.

2 A Not the statute, our constitution.

3 Q The constitution --

4 A Of Arkansas.

5 Q -- of Arkansas that prohibits just one --

6 A Right.

7 Q All right. Unconstitutional against the Federal  
8 Constitution, I take it?

9 A Yes.

10 Q In trying to show that that provision of the constitution  
11 was unconstitutional, would you not have had to first comply  
12 with the provisions of the Arkansas statute before you can  
13 raise the issue of the unconstitutionality of the  
14 constitutional provision?

15 A That wasn't my opinion.

16 Q I take it that given the feeling in Scott County you  
17 could have if you had wanted to obtained affidavits from  
18 citizens of Scott County stating the prejudice that was  
19 against John Swindler in Scott County?

20 A That would be speculation on my part, but I don't think  
21 that there would have been any -- I know that you could have  
22 probably gotten people to say, "Well, there's been lots of  
23 pretrial publicity down here and he probably can't get a fair  
24 trial." Now whether they would have signed an affidavit or  
25 not, that would have been up to the powers of persuasion of

1 the one talking to them.

2 Q You did not have too much trouble in getting those  
3 affidavits in Sebastian County, though, did you?

4 A Well, we --

5 Q In the first trial?

6 A Everything is trouble, but we got some.

7 Q But in the second instance you didn't even try to get any  
8 affidavits, then?

9 A No, sir.

10 MR. RAGAN: That's all.

11 THE COURT: Any recross?

12 MR. RAGAN: Judge, let me confer with --

13 THE COURT: All right.

14 BY MR. RAGAN:

15 Q Judge, during the first day and a half at the trial,  
16 there had not been any jurors seated, had there?

17 A I know we didn't get any the first day. I don't know  
18 when we got the first juror.

19 Q And the first jurors were seated after the procedure that  
20 you outlined on cross examination. The regular procedure was  
21 changed and the prosecution began asking questions; is that  
22 correct?

23 A I'm not sure whether he started that on the first day or  
24 the second day. I think he saw that it would -- that him  
25 trying to bolster them before he let them get to me was